

David K. Callahan, P.C. (IL 620227), dcallahan@kirkland.com  
KIRKLAND & ELLIS LLP  
300 N. LaSalle Street  
Chicago, Illinois 60654  
Telephone: 312-862-2000  
Facsimile: 312-862-2200

*Attorney For Plaintiffs and Counter-defendants*  
BAXTER HEALTHCARE CORPORATION,  
BAXTER INTERNATIONAL INC., and  
BAXTER HEALTHCARE SA

Maureen K. Toohey (SBN 196401), mtoohey@tooheyllaw.com  
TOOHEY LAW GROUP, LLC  
One Financial Center, 15th Floor  
Boston, Massachusetts 02111  
Telephone: (617) 748-5511

*Attorney for Plaintiff and Counter-defendant*  
DEKA PRODUCTS LIMITED PARTNERSHIP

Juanita R. Brooks (SBN 75934), jbrooks@fr.com  
FISH & RICHARDSON P.C.  
12390 El Camino Real  
San Diego, California 92130  
Telephone: (858) 678-5070  
Facsimile: (858) 678-5099

*Attorney for Defendants and Counter-claimants*  
FRESENIUS MEDICAL CARE HOLDINGS,  
INC. AND FRESENIUS USA, INC.

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

BAXTER HEALTHCARE CORPORATION,  
BAXTER INTERNATIONAL INC., BAXTER  
HEALTHCARE SA, AND DEKA LIMITED  
PARTNERSHIP,

*Plaintiffs and Counter-defendants,*

vs.

FRESENIUS MEDICAL CARE HOLDINGS,  
INC., d/b/a FRESENIUS MEDICAL CARE  
NORTH AMERICA, and FRESENIUS USA,  
INC.,

*Defendants and Counter-claimants.*

Case No. C 07-01359 PJH (JL)

**STIPULATION OF REMOVAL OF  
LIBERTY CYCLER FUNCTIONALITY  
RELATING TO, AND DISMISSAL OF,  
U.S. PATENTS NO. 5,438,510; 6,503,062;  
AND 6,808,369**

1 WHEREAS, Defendants have removed functionality from the Liberty™ peritoneal  
2 dialysis cyclers (as reflected in its current software, version 2.4.7) relating to the basis for  
3 Plaintiffs' assertion of the claims of U.S. Patents No. 5,438,510 (relating to alarms and line  
4 check) and 6,503,062 and 6,808,369 (relating to head height estimates and adjustments) as  
5 reflected in the expert reports of Jack Ganssle and William Durgin, dated April 24, 2009, and as  
6 Defendants stated in Defendants' Supplemental Responses to Baxter Plaintiffs' Interrogatories  
7 Nos. 1 and 9, dated May 12, 2009;

8 WHEREAS, Mr. Ganssle and Dr. Durgin identified a functionality in certain versions of  
9 the Liberty™ Cycler source code, which they refer to as "static patient pressure" as meeting the  
10 limitations "and wherein the controller estimates, based on information received from the  
11 transducer, a relative elevation between the fluid control device and the distal end" recited by  
12 claim 1 of the '369 Patent, and "the controller receiving information from the transducer,  
13 estimating a relative elevation between the control device and the distal end based on the  
14 information received from the transducer" recited by claim 7 of the '369 Patent;

15 WHEREAS, the Fresenius Defendants disagree with the opinions expressed by Mr.  
16 Ganssle and Dr. Durgin regarding the functionality they refer to as "static patient pressure," but  
17 nonetheless removed the functionality from version 2.4.7 of the Liberty™ Cycler source code  
18 and agree not to include this functionality or mere colorable variations of the functionality in the  
19 Liberty™ Cycler before the '369 Patent expires;

20 WHEREAS, Mr. Ganssle identified a functionality in certain versions of the Liberty™  
21 Cycler source code, which he refers to as "initial pressure offset" as meeting the limitations  
22 "calibrating the means for measuring [the] pressure" recited by claims 1 and 10 of the '062  
23 Patent, and "calibrating the pressure transducer" recited by claims 16 and 21 of the '062 Patent.

24 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.  
25 Ganssle regarding the functionality he refers to as "initial pressure offset," but nonetheless  
26 removed the functionality from version 2.4.7 of the Liberty™ Cycler source code and agree not  
27 to include this functionality or mere colorable variations of the functionality in the Liberty™

1 Cyclor before the '062 Patent expires;

2 WHEREAS, Mr. Ganssle identified a functionality in certain versions of the Liberty  
3 Cyclor source code, which he refers to as "Drain rate too low," in combination with what he  
4 identifies as the "flow-based drain alarm" functionality as satisfying the limitation "means for (i)  
5 continuing system operation for a predetermined time period in response to the second alarm  
6 signal; (ii) canceling the second alarm condition without user intervention when, after the  
7 predetermined time period, system operation satisfies the second set of criteria; and (iii)  
8 initiating a first alarm condition when, after the predetermined time period, system operation  
9 fails to satisfy the second set of criteria" recited by claim 1 of the '510 Patent;

10 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.  
11 Ganssle regarding the functionality he refers to as " Drain rate too low," but nonetheless  
12 removed the functionality from version 2.4.7 of the Liberty™ Cyclor source code and agree not  
13 to include this functionality or mere colorable variations of the functionality in the Liberty  
14 Cyclor before the '510 Patent expires;

15 WHEREAS, Mr. Ganssle identified functionalities in certain versions of the Liberty  
16 Cyclor source code, which he refers to as "line check" and "patient line check," as satisfying the  
17 limitation "control means operative, in response to the first command signal, for operating the  
18 pumping means to attempt to move liquid in the tubing from the pumping means toward the  
19 source and, if successful, registering an empty source condition and, if not successful, registering  
20 an occluded source tubing condition" recited by claim 9 of the '510 Patent and "operating the  
21 pump mechanism in response to the first command signal to attempt to move liquid in the tubing  
22 from the pumping mechanism toward the source and, if successful, registering an empty source  
23 condition and, if not successful, registering an occluded source condition" recited by claim 20 of  
24 the '510 Patent.

25 WHEREAS, the Fresenius Defendants disagree with the opinion expressed by Mr.  
26 Ganssle regarding the functionalities he refers to as "line check" and "patient line check," but  
27 nonetheless removed the functionalities from version 2.4.7 and earlier versions of the Liberty™

1 Cyclor source code and agree not to include these functionalities or mere colorable variations of  
 2 these functionalities in the Liberty™ Cyclor before the ‘510 Patent expires; and WHEREAS,  
 3 separately and apart from the foregoing considerations relating to the ‘510, ‘062 and ‘369  
 4 patents, the parties agree to dismiss all claims and counterclaims with respect to claims 21, 22,  
 5 24, 25, 26, 28, 29 and 30 of U.S. Patent No. 5,421,823 and claim 40 of U.S. Patent No.  
 6 5,431,626;

7  
 8 NOW, THEREFORE, the parties and their counsel of record stipulate as follows:

- 9 • Defendants agree that they will not make, use, sell, or offer for sale within the United  
 10 States or import into or export from the United States any peritoneal dialysis machine  
 11 with both the “Drain rate too low” functionality and the “flow-based drain alarm”  
 12 functionality, the “line check” functionality, or “patient line check” functionality—or  
 13 mere colorable variations of the functionality removed from the Liberty™ peritoneal  
 14 dialysis cyclor software—as claimed in U.S. Patent No. 5,438,510 until after the  
 15 expiration of U.S. Patent No. 5,438,510;
- 16 • Defendants agree that they will not make, use, sell, or offer for sale within the United  
 17 States or import into or export from the United States any peritoneal dialysis machine  
 18 with the “static patient pressure” or “initial pressure offset”-functionalities—or mere  
 19 colorable variations of the functionality removed from the Liberty™ peritoneal  
 20 dialysis cyclor—as claimed in U.S. Patents No. 6,503,062 and 6,808,369 until after  
 21 the expiration of U.S. Patents No. 6,503,062 and 6,808,369;
- 22 • All claims, defenses and counterclaims relating to U.S. Patents No. 5,438,510;  
 23 6,503,062; and 6,808,369 shall be dismissed, without prejudice, from the instant  
 24 litigation, with each party to bear its own costs and attorneys’ fees as to such claims,  
 25 defenses and counterclaims;
- 26 • The parties agree that this stipulation is not an injunction but reserve all rights and  
 27 remedies to enforce its terms; and

- All of Plaintiffs' claims with respect to claims 21, 22, 24, 25, 26, 28, 29 and 30 of U.S. Patent No. 5,421,823 and claim 40 of U.S. Patent No. 5,431,626 shall be dismissed with prejudice, and all of Defendants' defenses and counterclaims with respect to such claims of the '823 and '626 patents shall be dismissed without prejudice, with each party to bear its own costs and attorneys' fees as to such claims, defenses and counterclaims.

IT IS SO ORDERED.

Dated: 5/28/09



May 27, 2009

By: /s/ David K. Callahan /s/

KIRKLAND & ELLIS LLP  
David K. Callahan, P.C. (IL 620227)  
Garret Leach (*pro hac vice*)  
Mary Zaug (*pro hac vice*)  
200 East Randolph  
Chicago, Illinois, 60601  
Telephone: 312-861-2000  
Facsimile: 312-861-2200

Robert G. Krupka (SBN 196625)  
777 South Figueroa Street  
Los Angeles, California 90017  
Telephone: 213-680-8400  
Facsimile: 213-680-8500

Russell Tonkovich (SBN 233280)  
555 California Street  
San Francisco, California, 94104  
Telephone: 415-439-1400  
Facsimile: 415-439-1500

*Attorneys For Plaintiffs and Counter-defendants*  
**BAXTER HEALTHCARE CORPORATION,**  
**BAXTER INTERNATIONAL INC., and**  
**BAXTER HEALTHCARE SA**

May 27, 2009

By: /s/ Maureen K. Toohey /s/

Maureen K. Toohey (SBN 196401)  
TOOHEY LAW GROUP  
One Financial Center, 15th Floor  
Boston, Massachusetts 02111  
Telephone: (617) 748-5511

COBLENTZ, PATCH, DUFFY & BASS LLP  
Howard A. Slavitt (SBN 172840)  
Zuzana Ikels (St. Bar No. 208671)  
One Ferry Building, Suite 200  
San Francisco, California 94111-4213  
Telephone: (415) 391-4800  
Facsimile: (415) 989-1663

*Attorneys for Plaintiff and Counter-defendant*  
**DEKA PRODUCTS LIMITED PARTNERSHIP**

May 27, 2009

By: /s/ Michael E. Florey

FISH & RICHARDSON P.C.  
Juanita R. Brooks (SBN 75934)  
Todd G. Miller (SBN 163200)  
Michael M. Rosen (SBN 230964)  
12390 El Camino Real  
San Diego, CA 92130  
Telephone: (858) 678-5070  
Facsimile: (858) 678-5099

Mathias W. Samuel (*pro hac vice*)  
Michael E. Florey (*pro hac vice*)  
60 South Sixth Street, Suite 3200  
Minneapolis, MN 55402  
Telephone: (612) 335-5070  
Facsimile: (612) 288-9696

Limin Zheng (SBN 226875)  
500 Arguello Street, Suite 400  
Redwood City, CA 94053  
Telephone: (650) 839-5070  
Facsimile: (650) 839-5071

*Attorneys for Defendants and Counter-claimants*  
**FRESENIUS MEDICAL CARE HOLDINGS, INC. AND FRESENIUS USA, INC.**

**ELECTRONIC FILING DECLARATION OF DAVID K. CALLAHAN, P.C.**

I, David K. Callahan, declare as follows:

1. I am a partner at Kirkland & Ellis LLP, and I am Baxter Healthcare Corporation's, Baxter International Inc.'s, and Baxter Healthcare SA's legal counsel in the above-captioned litigation.
2. Pursuant to the Northern District of California Electronic Filing Procedures and General Order No. 45, I attest that Maureen K. Toohey, counsel for Plaintiff DEKA Products Limited Partnership and Michael E. Florey, counsel for Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc. concur in the filing of this document and have granted me permission to electronically file this document absent their actual signatures.

Dated: May 27, 2009

Respectfully submitted,

Kirkland & Ellis LLP

By: /s David K. Callahan s/  
David K. Callahan, P.C. (IL 620227),  
dcallahan@kirkland.com

*Attorney for Plaintiffs and Counter-defendants  
BAXTER HEALTHCARE CORPORATION,  
BAXTER INTERNATIONAL INC., and  
BAXTER HEALTHCARE SA*